Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	

ORDER ON RECONSIDERATION

Adopted: April 16, 2002 **Released: April 22 , 2002**

By the Commission:

I. INTRODUCTION

1. In this *Order on Reconsideration*, we address petitions for reconsideration or clarification of the *Report and Order*[1] in this docket, which implemented the cable reform provisions of the Telecommunications Act of 1996 ("1996 Act").[2] Petitioners generally focus on three main areas; cable operator technical standards, the uniform rate requirement exception for multiple dwelling units ("MDUs") and the small cable operator rate regulation exemption. We address the petitions below.

II. TECHNICAL STANDARDS

A. Background

2. Pursuant to Section 624(e) of the Communications Act, the Commission adopted technical standards that govern the picture quality performance of cable television systems.[3] Prior to enactment of the 1996 Act, Section 624(e) provided, in part:

> A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection.[4]

[1] *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296 (1999).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151, *et seq*.

[3] 47 C.F.R., Part 76, Subpart K.

[4] 1992 Cable Act § 16(a), 106 Stat. 1490.

Section 301(e) of the 1996 Act amended Section 624(e) by replacing this language with the following:

> No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.[5]

3. In the *Report and Order*, the Commission concluded that while Section 624(e) does not preclude local franchising authorities ("LFAs") from engaging in day-to-day local enforcement of technical standards under the Commission's rules, it nevertheless imposes limits on the role LFAs play with respect to cable subscriber equipment and transmission technology.[6] The Commission stated that an LFA may not, for example, control whether a cable operator uses digital or analog transmissions, nor can it determine whether its transmission plant is composed of coaxial cable, fiber optic cable, or microwave radio facilities.[7]

B. Discussion

4. Petitioners express various concerns regarding the impact of Section 624(e) on the ability of an LFA to establish and enforce requirements for facilities and equipment. NATOA argues that "transmission technology" as used in Section 624(e) refers only to signal transmission formats and set-top boxes.[8] NATOA states that, in the *Report and Order*, the Commission goes far beyond the language of the statute and Congressional intent by construing "subscriber equipment and transmission technology" to include all of the facilities used to create a cable system as well as the "specific modulation or communications format" of the signal.[9] NATOA asserts a narrower reading is necessary because; 1) Congress enacted section 624(e) only in response to specific scrambling issues, 2) the Commission's broad interpretation conflicts with other portions of the statute, and 3) it is in the Nation's interest to allow LFAs to negotiate with cable operators for the provision of fiber optics and digital capability for advanced cable systems.

5. According to NATOA, the amendment to section 624(e) was in response to a then-current controversy involving whether state and local laws that regulate converter boxes and restrict scrambling of non-basic service tiers are preempted by federal law.[10] NATOA asserts that Congress' use of the terms "subscriber equipment" and "transmission technology" in the new language in section 624(e) was meant simply to address this controversy by allowing cable operators to select which signals to scramble and the means of signal decoding.[11] MediaOne, Time Warner, Ameritech and NCTA note the absence of supporting legislative history for NATOA's assertions, instead citing more expansive language

[5] 1996 Act, § 301(e), 100 Stat. 116; 47 U.S.C. § 544(e).

[6] *Report and Order* ¶¶ 117-143.

[7] *Id*. ¶ 141.

[8] National Association of Telecommunications Officers and Advisors, National Association of Counties, United States Conference of Mayors and Montgomery County, Maryland ("NATOA") comments at 7.

[9] NATOA comments at 7-8.

[10] NATOA comments at 8-9, citing *Committee on Science, Technology and Energy of the New Hampshire House of Representatives*, 11 FCC Rcd 10,250 (1996); *System Notes*, Multichannel News, Feb 13, 1995, at 30; *Time Warner Retreats on Set-Top requirements for Subscribers*, Multichannel News, March 27, 1995.

[11] NATOA comments at 9.

in the history that indicates the amendment was intended to avoid "the effects of disjointed local regulation," and the "patchwork of regulations that would result from a locality-by-locality approach . . . in today's intensely dynamic technological environment."[12] NCTA and Time Warner also point to uses of the word "scrambling" by Congress when specifically addressing scrambling issues,[13] and MediaOne and Time Warner likewise note uses of the word "transmission" by Congress and the Commission that are not confined to scrambling issues.[14]

6. NATOA also asserts that the Commission's interpretation of "subscriber equipment and transmission technology" conflicts with other portions of the statute.[15] Specifically, NATOA cites section 624(b)(1) (allowing LFAs, in requests for proposals for new or renewing cable systems, to "establish requirements for facilities and equipment"), section 624(b)(2) (allowing LFAs to enforce "*any* requirements contained within the franchise for facilities and equipment") and section 626(b)(2)(allowing LFAs to require proposals for cable system upgrades).[16] NATOA argues that, under the Commission's reading of section 624(e), an LFA attempting to engage in franchising or renewal would not be able to require an operator to "describe the system that it plans to build, and then to build the specific system it promises to construct."[17] According to NATOA, because the system design affects its function, including its reliability, an LFA would be unable to assess whether the system reasonably satisfies the cable related needs and interests of the community "without knowing what system is proposed, in some detail."[18] NATOA also states that cable renewal evaluation by LFAs would be rendered meaningless if an operator could configure its system without regard to its originally proposed system design.[19]

7. Time Warner, MediaOne and NCTA state that, in the *Report and Order*, the Commission already carefully considered the interplay between amended section 624(e) and other provisions. Time Warner states that under 624(b)(1) and (2), LFAs may continue to enact and enforce requirements related to the needs and interests of the community, including with respect to facilities and equipment related to

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[12] Time Warner Cable ("Time Warner") opposition at 4-5, quoting H.R. Rep No. 204(1), 104th Cong. 1st Sess. 110 (1995); MediaOne Group, Inc. ("MediaOne") opposition at 11-12; Ameritech New Media, Inc. ("Ameritech") opposition at 4-5; National Cable Television Association ("NCTA") opposition at 3-5.

[13] NCTA opposition at 4-5 citing 47 U.S.C. § 624A(b)(2) ("the Commission shall not limit the use of scrambling or encryption technology . . ."), 47 U.S.C. § 560, 561 (addressing scrambling of cable channels); Time Warner opposition at 5 citing 47 U.S.C. § 544A(a)(i)(VCRs may be affected by "scrambing, encoding or encryption technologies and devices"), 47 U.S.C. § 544A(b)(2)(Commission may not limit "scrambling or encryption technology" in certain circumstances).

[14] MediaOne opposition at 11 citing 47 U.S.C. § 522(7), Telecommunications Act of 1996 at § 706, 5 FCC Rcd 7638 (1990). Time Warner opposition at 5, citing the *Report and Order* at ¶ 141 and notes 389-390*; First Report and Order*, 9 FCC Rcd 1981, ¶ 110 (1994) (referencing cable deployment of "two way transmission technologies"); *Memorandum Opinion and Order*, 7 FCC Rcd 8676, ¶ 16 (1992) (referencing "microwave transmission technology"); *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry*, 7 FCC Rcd 300, ¶ 18 (1992) (referencing "optical transmission technologies").

[15] NATOA comments at 9.

[16] *Id*. at 10-12 citing 47 U.S.C. § 544(b)(1) and (2) (emphasis added) and 47 U.S.C. § 546.

[17] NATOA comments at 10-11.

[18] *Id*. at 11.

[19] *Id*.

PEG channels and customer service.[20] Time Warner further asserts that an LFA may enforce franchise agreements regarding the provision of certain services at a certain level of quality, and can require an operator to propose a system upgrade; however, an LFA may not dictate the technological means by which an operator meets these obligations.[21] Ameritech asserts that an LFA will be well aware of an operator's system plans because an LFA may still inquire as to cable operator franchising and renewal proposals under the statute, and enforce thereafter commitments made by a cable operator.[22]

8. NATOA also states that in keeping with the 1996 Act's promotion of the deployment of advanced telecommunications capabilities, LFAs should be "encouraged, and not preempted from requiring better, more modern networks."[23] According to NATOA, without such requirements, upgrades may not occur in a timely fashion (if at all) in many communities, including rural and center city areas,[24] and that LFAs need to be able to specify a cable operator's use of fiber optics and digital capacity, particularly with respect to a community's institutional network ("I-NET") needs.[25] NATOA asserts that local enforcement of the Commission's signal quality standards does not provide sufficient inducement for an operator to upgrade its system. NATOA states that a cable operator that does not face competition in a particular service area will not have an incentive to offer high quality service, and will not offer such service, if the LFA cannot require specific upgrades.[26]

9. NCTA, Time Warner and Ameritech again answer that the legislative history clearly demonstrates Congressional intent to remove inconsistencies in local technical regulation.[27] Time Warner asserts that Congress recognized that in a rapidly changing technological environment, a cable operator must not be hindered in its ability to take advantage of new innovations.[28] Time Warner states that subscribers are interested in ends, not means, and that just because particular ends are currently achievable by a particular means, a cable operator should not later be precluded from using different technological means to achieve the same ends.[29]

10. NATOA also asks that the Commission clarify that any prohibition on LFA enactment and enforcement of technical standards (that differ from the Commission's) in section 624(e) applies only to requirements unilaterally imposed by ordinance, and not to agreements regarding facilities and equipment made during formal renewal negotiations or otherwise voluntarily agreed to by a cable operator as is provided for in sections 624(b)(1) and (2).[30] NATOA asserts that facilities and equipment negotiations are an integral part of the overall franchising and renewal process, noting that a community

[20] Time Warner opposition at 6-7.

[21] *Id*.

[22] Ameritech opposition at 6.

[23] NATOA comments at 12-13.

[24] *Id*. at 13.

[25] *Id*. at 14.

[26] *Id*. at 15.

[27] NCTA opposition at 7.

[28] Time Warner opposition at 9.

[29] *Id*. at 8.

[30] NATOA reply comments at 2-4.

may be able to, for example, offer a longer franchise term if it is confident that an operator will implement an advanced system design.[31] NCTA replies that Section 624(a) clearly bars LFAs from regulating services, equipment and facilities "except to the extent *consistent with* this title," and that not barring LFAs from requesting and enforcing agreements regarding specific technical standards is wholly *inconsistent*.[32]

11. In addition, Time Warner states that the Commission erred when it held that LFAs can continue to enforce the Commission's technical standards. Time Warner asserts that the Commission's decision in this regard is inconsistent with Congress' deletion of language in Section 624(e), and that if the Commission is able to enforce the technical rules applicable to thousands of broadcast (and other) licensees, it should likewise be able to enforce cable technical standards.[33] NATOA states that the Commission correctly recognized that LFAs may continue to enforce the Commission's technical requirements.[34] However, NATOA asserts that many cable systems are not in compliance with the Commission's technical standards, the standards are difficult to enforce and LFAs generally do not hear of problems until after the fact.[35] According to NATOA, the Commission has undercut LFAs' ability to most effectively ensure compliance with the Commission's standards by eliminating LFAs' ability to ensure the construction of advanced systems that meet a limited set of criteria.[36]

12. The Commission has previously considered, in the *Report and Order*, arguments made by commenters here. While we recognize that "transmission technology" is not specifically defined in the Act, NATOA's narrow reading of "transmission technology" as referring only to scrambling technologies is not supported by legislative history, Commission precedent or, as noted by commenters above, by statutory uses of the words "transmission" and "scrambling."[37] Nowhere in the legislative history does Congress limit the term "transmission technology" to scrambling formats, and we continue to believe that Congress used the term as is used in an everyday, communications policy sense.[38] As we stated in the *Report and Order*, a review of the common usage of the phrase, including its use in Commission precedent, indicates that it has been "frequently used to include both the transmission medium, i.e. microwave, satellite, coaxial cable, twisted pair copper telephone lines, and fiber optic systems,[39] and the

[31] NATOA comments 18.

[32] NCTA opposition at 9; *see also* Time Warner opposition at 2-4.

[33] Time Warner opposition at note 14.

[34] NATOA reply comment at 8-9.

[35] NATOA reply comment at 8-9, Afferbach Decl. at 9-12.

[36] *Id*.

[37] *Report and Order* ¶ 141.

[38] *Id*.

[39] *Id*. at note 389 ("[t]hus, for example, the State of Tennessee adopted a regulatory reform program involving the replacement of existing telephone plant with fiber optics that was judicially described as involving a change in "transmission technologies." *See Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W. 2d 151, 156 (1992). A Commission report, *Trends in Telephone Service*, 1999 WL 83930 (February 1999), contains a discussion of "transmission technology" and lists "copper" and "fiber optic cables" as two transmission technologies. The Commission has discussed satellites and undersea cables as two "transmission technologies." *Communications Satellite Corp.*, 56 FCC 2d 1101, 1161 (1975). *See also Comsat Corp.*, 13 FCC Rcd. 14083, para. 32 (1998) (There is no evidence that parties "owning or controlling both satellite and cable connections . . . are favoring the use of one transmission technology.")").

specific modulation or communications format, i.e. analog or digital communications."[40] Accordingly, in the *Report and Order*, the Commission concluded that, for example, local authorities may not control whether a cable operator uses digital or analog transmissions nor determine whether an operator's transmission plant is composed of coaxial cable, fiber optic cable, or microwave radio facilities.[41]

13. We also continue to believe that this interpretation of section 624(e) is compatible with other portions of the statute. While an LFA may still establish and enforce requirements for facilities and equipment pursuant to the franchising and renewal provisions of the statute, these requirements are limited by the statutory directive that forbids an LFA from dictating the use of particular transmission technologies. In the *Report and Order*, the Commission noted that, under the statute, proposals for cable franchise renewal under section 626(b)(2), including upgrade proposals, may be required by an LFA but are "[s]ubject to section 624," and that the grant of authority under section 624(b) to establish facilities and equipment requirements "to the extent consistent with this title" must be read in conjunction with the limiting language of the 1996 Act in section 624(e).[42] As noted above, NATOA argues that while this may mean that *regulation* by the LFA is forbidden, the statute does not limit *negotiated* equipment and facilities provisions of franchise agreements under sections 626(b)(2) and 624(b)(1) and (2). However, there is no indication in either the statute or the legislative history that the limitations imposed by Congress regarding subscriber equipment and transmission technology were intended to apply differently depending on whether the requirements are contained in a local ordinance or in a franchise agreement.

14. We are also not persuaded that our decision regarding the limiting effect of section 624(e) renders an LFA unable to adequately establish requirements that promote community-related needs and interests. In the *Report and Order*, the Commission cited the continued authority of LFAs over: 1) facilities and equipment requirements relating to governmental and educational uses of institutional networks ("INETs") and public, educational and governmental ("PEG") channels under sections 611 and 621(b)(3)(D); 2) access to cable service throughout the franchise area without regard to the income levels of subscribers under 621(a)(4); 3) assurances as to the financial, legal and technical qualifications of a cable operator under section 621(a)(4); 4) the ability of an LFA (subject to section 624) to require a franchise renewal proposal that includes a system upgrade under section 626(b)(2); and 5) establishment and enforcement by LFAs of construction schedules and performance requirements under section

[40] *Id*. at note 390 ("[t]he Commission has consistently described "analog" and "digital" communications as well as various modulation schemes as different "transmission technologies." *See e.g. Development of Wireline Services Offering Advanced Telecommunications Capability*, 1998 WL 458500, para. 35 ("xDSL and packet switching are simply transmission technologies"); Public Notice: Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000, 13 FCC Rcd 16221, 16222 (commercial mobile radio service licensee has flexibility "to change their existing radio transmission technology."); *Application for Transfer of Control of MCI Communications to Worldcom*, 1998 WL 611053, para. 45 ("Qwest's network will include more fibers per cable than the current average national network, and will employ high capacity transmission technologies."); *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements through the Year 2010*, 1998 WL 667599, n.315 (1998) ("In the Second Notice, we entitled sections primarily addressing the question of analog versus digital modulation `Transmission Technology', a more general term that seemingly could encompass many other issues as well."); *Creation of A Low Power Radio Service*, MM Docket No. 99-25, 1999 WL 46878, para. 29 (1999) ("We are also concerned whether an LP1000 service would limit or impair the ability of full power stations to implement digital transmission technology such as in-band-on-channel (`IBOC') conversion.")").

[41] *Report and Order* ¶ 141.

[42] *Id*. at ¶ 142.

632(a)(2).[43] We agree with Ameritech and NATOA to the extent that, while a franchising authority may not require that a franchise proposal contain provisions prohibited under section 624(e), a franchising authority may enforce permissible facilities and equipment provisions such as those listed above that are ultimately included in the franchise agreement.[44] In any case, an LFA may reject a franchise proposal that does not meet community-related needs and interests or, as noted by NATOA above, to offer a longer or shorter franchise term based on the provisions of the franchise agreement as a whole.

15. We further note that state and local governments are not preempted from enforcing cable signal quality standards as long as such activity is not inconsistent with the rules adopted by the Commission. We do not find in the 1996 Act changes to section 624(e) any affirmative prohibition on such enforcement activities[45] and we believe that if Congress had intended to put an end to the long tradition of local involvement in the enforcement of technical standards, it would have stated so specifically in the amendments to section 624(e). Commenters have presented us with no new facts or legal arguments that necessitate modification of this finding. As we noted in the *Report and Order*, while Congress clearly indicated its desire to preclude a patchwork of varying technical standards in different franchise areas, it did not indicate a desire to make a fundamental change in technical standards enforcement.[46]

16. NATOA also asks the Commission to clarify that technical requirements that would be found impermissible under the *Report and Order*, but that were included in franchise agreements entered into after the adoption of the 1996 Act (and before the release of the *Report and Order*) are not preempted. NATOA states that provisions such as those for upgrades using specific facilities and equipment should be retained because they were based on "common, reasonable interpretations" of amended section 624(e), and were negotiated and agreed to by LFAs and cable operators.[47] According to NATOA, preemption of these negotiated provisions will result in significant litigation that will ultimately harm subscribers.[48]

17. Time Warner asserts that the amendment should be applied prospectively as of the effective date of the 1996 Act, not as of the date of the subsequent *Report and Order*.[49] According to Time Warner, NCTA and MediaOne, the amendment's meaning is unambiguous and self-executing, as demonstrated by the fact that Congress did not specifically direct the Commission to undertake a rulemaking with respect to the changes to 624(e).[50] MediaOne acknowledges that, in practice, there are always disagreements between LFAs and cable operators as to the specific meaning of language in applicable law, but asserts that severability clauses in franchise agreements allow the parties to "agree to

[43] *Id.*.

[44] NATOA comments at nt. 38; Ameritech opposition at 6.

[45] Section 601(c)(1) of the 1996 Act, which was adopted at the same time as Section 624(e), directs that the amendments made by the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Acts or amendments." 1996 Act, § 601(c)(1).

[46] *Report and Order ¶ 135.*

[47] NATOA comments at 16.

[48] *Id.*

[49] Time Warner opposition at 10.

[50] *Id.*, MediaOne opposition at 17, NCTA opposition at 8.

disagree" and complete franchising and renewal proceedings in a timely fashion.[51] MediaOne argues that "grandfathering" the provisions at issue would deprive LFAs and operators of the ability to rely on these severability clauses, and would result in widespread confusion and routine suspension of franchise negotiations until the Commission or courts decided disputed issues in a final, non-appealable order.[52] Finally, MediaOne states that courts have repeatedly found that federal standards cannot be contracted away.[53]

18. NATOA replies that the statute did not define the term "transmission technology," and if the Commission has the authority to define the term, the amendments to Section 624(e) cannot be self-executing."[54] NATOA states that courts have refused to apply new regulations retroactively, especially when such application would affect contractual matters.[55]

19. In the *Report and Order*, the Commission recognized the possibility that franchise agreements entered into after enactment of the 1996 Act may have been drafted in a way that the parties believed permissible under the amendment to section 624(e), but that would be found impermissible under the Commission's reading of the section in the *Report and Order*.[56] The Commission stated that had such parties had the benefit of the decision in the *Report and Order*, these provisions could have been drafted in such a way as avoid their running afoul of section 624(e).[57]

20. We reiterate here that nothing in the *Report and Order* (or this *Order on Reconsideration*) is intended automatically to preempt or affect the enforceability of franchise agreements entered into after enactment of the 1996 Act.[58] As noted above, the Commission based its interpretation of "transmission technology" on "the everyday sense which it has been used in discussion of communications policy issues." If franchise provisions negotiated and agreed to by cable operators and LFAs after the enactment of the 1996 Act were based on "common, reasonable interpretations"[59] of the statute, as advanced by the LFA petitioners, and the amendment to section 624(e) was "clear and unambiguous" as advanced by cable interests, the agreed to provisions may in many cases not in fact be violative of amended section 624(e).[60] However, we believe that amended section 624(e) became effective as of the date of enactment of the 1996

[51] MediaOne opposition at 17.

[52] *Id*. at 18.

[53] *Id*. at 18-19.

[54] NATOA comments at 6.

[55] *Id*.

[56] *Report and Order* ¶ 143.

[57] *Id*.

[58] *Id*.

[59] NATOA comments at 15.

[60] We note that NATOA submitted portions of the Fairfax County, VA and Montgomery County, MD franchising agreements (*see* NATOA comments at Exhibits A and B). Our general discussion of the 1996 amendment to section 624(e) in this *Order on Reconsideration* is not intended to specifically address whether the submitted portions of the agreements are permissible under the statute.

Act, and we will not grandfather provisions of franchise agreements that were entered into to after this date that are impermissible under that section.[61]

III. UNIFORM RATE REQUIREMENT

A. Background

21. Section 623(d) of the Communications Act requires that: "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[62] The 1996 Act retained the uniform rate requirement for cable operators not subject to effective competition, but exempted bulk discounts to multiple dwelling units ("MDUs") from the requirement, and prohibited cable operators from charging predatory prices to MDUs.[63]

22. In the *Report and Order*, the Commission stated that a "bulk discount" is a volume discount offered to all residents of an MDU, regardless of whether the discount is negotiated with, or billed to, a building owner or manager, and is not premised on exclusive access to all residents.[64] The Commission also stated that the 1996 Act did not require a different interpretation of "MDU" than had been used previously by the Commission, noting that in the *Rate Order*, the Commission concluded that "bulk discounts to multiple dwelling units, including apartment buildings, hotels, condominium associations, hospitals, universities, and trailer parks, could form a valid basis for distinctions amongst subscribers and would be consistent with the uniform rate requirement."[65]

B. Discussion

23. Issues raised by the petitioners include; 1) whether the Commission correctly interpreted the meaning of the term "bulk discount," 2) whether the Commission's characterization of "MDU" is consistent with the 1996 Act amendment, 3) whether a complainant must first make a prima facie showing of predatory pricing by a cable operator before the cable operator must show that the discounted rate is not predatory, and 4) whether the prohibition on predatory pricing in MDUs applies only when the cable operator is not subject to effective competition.

24. *Bulk discounts.* The Wireless Communications Association ("WCA") asserts that in order for there to be a "bulk discount" under the statute, a landlord or building manager must negotiate

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[61] The date of enactment of the 1996 Act was February 8, 1996.

[62] 47 U.S.C. § 543(d); *see* 47 C.F.R. § 76.984.

[63] The 1996 Act amendment to the uniform rate language provides:

> This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

[64] *See Report and Order* ¶¶ 100-102.

[65] *See Report and Order* ¶ 105, citing *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd. 5631, 5897-98 (1993)("*Rate Order*").

and pay a single discounted rate in exchange for guaranteeing 100% subscriber penetration.[66] While recognizing that "bulk discount" is not defined in the Communications Act, WCA asserts that by equating a bulk discount with a volume discount, and allowing the bulk discount exception to apply where a cable operator bills and offers service to MDU residents directly, the Commission has impermissibly expanded the definition of "bulk discount" beyond its common meaning.[67] WCA notes that Black's Law Dictionary defines "bulk sale" as a "sale of substantially all the inventory of a trade or business to *one person in one transaction*" (emphasis added by WCA), and cites prior Commission statements that it asserts contradict the *Report and Order*, including the Commission's tentative conclusion in the *Notice of Proposed Rulemaking* in this proceeding that bulk discounts are negotiated by the property owner or manager on behalf of all of its tenants.[68]

25. Time Warner replies that Congress intended the bulk discount exception to section 623(d) to address instances where the uniform rate requirement effectively prevented MDU residents from receiving discounted MDU prices.[69] Time Warner asserts that WCA's narrow interpretation of MDU would hamper Congressional intent; denying bulk discounts even to MDUs in which landlords receive a single bill, but individual subscribers pay separately for premium services.[70] NCTA notes that WCA has cited the Black's Law definition of "bulk sale" and not "bulk discount" which is the relevant statutory term and, furthermore, that the Act does not define "bulk discount."[71] NCTA also questions WCA's assertion that the Commission ignored the plain language of the statute by equating the terms "bulk" and "volume" when dictionaries identify them as synonyms.[72] Both Time Warner and NCTA state that Congress clearly left the Commission the discretion to interpret "bulk discount" in a manner consistent with the new statutory language and, furthermore, that the examples of Commission precedent cited by WCA do not demonstrate any specific prior definition of the term "bulk" by the Commission.[73]

26. We continue to believe that there is no statutory or policy reason to place conditions such as those suggested by WCA on a "bulk discount" under section 623(d). As we noted in the *Report and Order*, the House Commerce Committee proposed the statutory change because the Commission's former regulations did "not serve consumers well by effectively prohibiting cable operators from offering *lower* prices in an MDU even where there is another distributor offering the same video programming in that MDU."[74] We share this concern, and believe that WCA's proffered interpretation of "bulk discount" would serve to thwart Congressional intent. For example, WCA asserts that a guarantee of 100%

[66] WCA reply comments at 2-4; *see also* WCA comments at 3, 6-7.

[67] WCA comments at 5-8; WCA reply comments at 1-3.

[68] WCA reply comments at 4-6, citing the *Notice of Proposed Rulemaking* (11 FCC Rcd. 5837, 5970-71(1996)).

[69] Time Warner opposition at 13-14, quoting H.R. Rep. No. 204, 104th Cong., 1st Sess. 110 (1995)("House Report")(the Commissions former regulations did "not serve consumers well by effectively prohibiting cable operators from offering *lower* prices in an MDU even where there is another distributor offering the same video programming in that MDU"(emphasis original).

[70] Time Warner opposition at 15-18.

[71] NCTA opposition at 13.

[72] *Id*.

[73] Time Warner opposition at 16-17. NCTA opposition at 13-16.

[74] H.R. Rep. No. 204, 104th Cong., 1st Sess. 110 (1995)("House Report")(emphasis in original).

subscriber penetration by a building owner or manager is a necessary component of a true bulk discount.[75] However, we continue to believe that "bulk discounts should not be premised on a cable operator's exclusive access to all residents," and that a "negotiated" discount requirement applicable only to cable operators can limit their ability to respond to competition."[76] Indeed, requiring an *exclusive access* agreement as a prerequisite for offering discounted MDU rates would limit competitors' access to MDUs, and would be at odds with the Congressional objective of allowing cable operators to offer discounts in response to *competition* in MDUs.

27. We also do not agree that our finding is at odds with Commission precedent or with the plain meaning of the term "bulk." In none of the examples cited by WCA does the Commission require that a bulk discount be negotiated with a building owner in exchange for access to all of residents of the building, nor does the Commission otherwise discuss and decide this issue. WCA is correct when it states that, in the *NPRM* in this proceeding, the Commission tentatively concluded that a "bulk discount" is negotiated by the property owner or manager on behalf of all of the tenants.[77] However, while a tentative conclusion may relay how an agency initially is considering resolving an issue, it is often based on limited information before the agency at the time, and does not preclude the Commission from altering its final position based on a more complete record. That the Commission, in response to a new statutory amendment, specifically sought comment on a tentative conclusion, indicates that the Commission in fact recognized that it needed more information in order to make a fully informed decision, and not that the Commission had previously settled the issue. Finally, we are not persuaded that the Commission departed from any common usage of the term "bulk" when equating it to "volume." As noted by NCTA, dictionaries list "bulk" and "volume" as synonyms.[78]

28. *MDUs*. WCA also asserts that the Commission's definition of MDU departs from precedent and is so expansive that, if carried to the extreme, would encompass a city block of single-family homes that can be served without crossing a right-of way.[79] NCTA replies that the Commission's interpretation of MDU is consistent with both Commission precedent and the Congressional objective of loosening regulatory restraints on cable operators so that consumers could benefit from lower rates.[80]

29. We do not agree that the Commission's decision to rely on the characterization of "MDU" established in the *Rate Order* constitutes an impermissible expansion of or departure from Commission precedent, and we are presented with no new facts or arguments that warrant reconsideration of this decision. As the Commission observed in the *Report and Order*, in the context of exemptions

[75] WCA reply comments at 3-4, 6. In response to Time Warners's opposition (asserting that WCA would deny bulk discounts even to MDUs in which landlords receive a single bill, but individual subscribers pay separately for premium services (Time Warner opposition at 15-18)), WCA appears to modify its position with respect to individual billing, stating that "where an incumbent cable operator negotiates a single bulk rate with a landlord in exchange for a guarantee of 100% penetration, but bills each tenant separately at the landlord's request, the incumbent cable operator should be entitled to the benefits of the statutory bulk discount exception since the underlying sale of service is a true "bulk" sale" (WCA reply comment at 6).

[76] *Report and Order* ¶¶ 100-101.

[77] WCA reply at 3-4.

[78] NCTA opposition at 13, citing Webster's New Collegiate Dictionary, American Heritage Dictionary, Roget's Thesaurus.

[79] WCA comments at 8-10.

[80] NCTA opposition at 16-17.

from the uniform rate requirement, the Commission has historically considered exceptions based on reasonable categories of customers and service.[81] As noted above, in the *Rate Order*, the Commission concluded that "bulk discounts to multiple dwelling units, including apartment buildings, hotels, condominium associations, hospitals, universities, and trailer parks, could form a valid basis for distinctions amongst subscribers" and would be consistent with the uniform rate requirement.[82] We are not persuaded that the 1996 Act amendment requires us to depart from this characterization and, accordingly, we continue to believe that exemptions to the uniform rate requirement should apply in situations such as those addressed in the *Rate Order*.[83]

30. *Predatory Pricing*. WCA also asks the Commission to reword section 76.984(c)(3) of our rules to clarify that the statutory prohibition on predatory pricing applies regardless of whether a cable operator is subject to effective competition.[84] Section 76.984(c)(3) exempts bulk discounts for MDUs from the uniform rate requirement, "except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit."[85] WCA notes that while the Commission clearly stated in the *Report and Order* that "Congress prohibited cable operators offering bulk discounts from charging predatory prices in MDUs," the corresponding Commission rule could be misconstrued to permit predatory pricing by a cable operator that is subject to effective competition or in non-MDUs.[86] NCTA replies that the language used in the Commission's rule is identical to that of the statute, and that the plain language of the statute clearly indicates that the Commission can only address predatory pricing claims where an operator does not face effective competition.[87] According to NCTA, if an operator faces effective competition, a competitor alleging predatory pricing can instead avail itself of traditional antitrust forums.[88] WCA asserts that while the language of the amendment may be unclear, its

[81] *Report and Order* ¶ 105. As WCA notes, the Commission recognized in the *NPRM* that in another context (specifically, whether certain cable facilities fell within the private cable exemption to the definition of a cable system and, therefore, were not subject to cable television regulation as a whole), the Commission stated that MDUs included single buildings that contain multiple residences, but excluded developments consisting of detached single-family residences, such as mobile home parks, planned and resort communities, and military installations. *See First Report and Order* in Docket No. 20561, FCC 77-205, 63 FCC 2d 956, 996-97 (1977).; *In Re Massachusetts Community Antenna Television Commission*, FCC 87-372, 2 FCC Rcd 7321 (1987). WCA also notes, as did the Commission in the *Report and Order*, that the 1996 Act expanded the private cable exemption to the definition of a cable system (*see* 1996 Act, § 301(a)(2), *codified at* Communications Act, § 602(7); WCA comments at note 24). However, as the Commission found in the *Report and Order*, we need not decide here how the MDU exemption to uniform rates corresponds to the private cable exemption from the definition of a cable system (*see Report and Order* at ¶ 105), and we continue to believe that, because we are exploring statutory change to the uniform rate requirement, Commission precedent in the uniform rate context has the most relevance to the issue at hand.

[82] *See Report and Order* ¶ 105, citing *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd. 5631, 5897-98 (1993)("*Rate Order*").

[83] *See Report and Order* ¶ 105.

[84] WCA comments at 10-12.

[85] 47 C.F.R.§ 76.984(c)(3).

[86] *Id.*

[87] NCTA opposition at 17-18.

[88] *Id*.

legislative history leaves no doubt that it forbids predatory pricing by a cable operator under any circumstances.[89] According to Joint Conference Committee member Senator Slade Gorton:

> . . . there has been concern that this somewhat awkwardly worded section implicitly condones predatory pricing once there is competition in a market, or for subscribers who do not live in MDUs. Clearly it is not the intent of Congress to supercede the Sherman Act by allowing cable operators to engage in predatory pricing at any time or any circumstances. In fact, the legislation includes a general antitrust savings clause in section 601(b). This clause guarantees that antitrust concerns still will be addressed in the telecommunications industry.[90]

31. We agree with WCA that the statutory amendment, as clarified by the legislative history, is not meant to condone predatory pricing. However, the plain language of the statute limits the class of cable operators against which a section 623(d) predatory pricing complaint can be brought *before the Commission*. As NCTA notes, a cable operator that is subject to effective competition, and thereby exempt from Commission rate regulation, is likewise not subject to a section 623(d) predatory pricing proceeding.[91] Although a section 623(d) predatory pricing complaint may only be brought before the Commission if an operator does not face effective competition, this limitation does not restrict any other action a person may bring or rights a person may have under antitrust laws.

32. Finally, we are not persuaded that the Commission's procedures inappropriately place the initial burden of showing that a discounted price is predatory on LFAs.[92] The 1996 Act provided that "[u]pon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory." NCTA and Time Warner state that section 301(b)(2) of the 1996 Act squarely places the initial burden of showing that there is reason to believe that a rate is predatory on the complainant.[93] We agree. A Commission rule to the contrary would clearly contradict the plain language of the statute.

IV. SMALL CABLE OPERATORS

A. Background

33. Section 301(c) of the 1996 Act amended Section 623 of the Communications Act to exempt small cable operators from rate regulation requirements. Section 623(m) of the Communications Act now defines a small cable operator as "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[94] The exemption applies to cable programming services or a basic service tier that was the only service tier subject to regulation as of December 31, 1994 in any franchise area in which that operator services 50,000 or fewer subscribers.

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[89] WCA comments at 11-12.

[90] WCA comments at 11 quoting 142 Cong. Rec. 5720 (daily ed. Feb 1, 1996)(statement of Sen. Gorton).

[91] NCTA opposition at 17-18.

[92] NATOA comments at 20.

[93] 47 U.S.C. § 543(d); NCTA opposition at 10-11; Time Warner opposition at 20.

[94] 47 U.S.C. § 543(m).

34. In the *Report and Order*, the Commission concluded that truly passive investments in a cable operator should not be considered when examining an operator's affiliation with another entity in the context of determining eligibility for small cable operator rate deregulation. The Commission therefore modified the interim rule that had required the consideration of both passive and active investments.[95] The Commission stated that counting truly passive investments could punish a large number of operators that presumably were the intended beneficiaries of the small operator provision of the 1996 Act.[96] The Commission also stated that: "A cable investor that takes an equity interest in the cable operator goes beyond passivity when the investor places its own representative on the cable operator's board of directors or on an advisory committee or in any other manner has its representatives involved in the operation of the business.[97] Likewise, an investor will not be deemed passive if it retains the authority to approve or disapprove the cable operator's standard business transactions."[98]

B. Discussion

35. The American Cable Association ("ACA") states that while the Commission was correct when it recognized in the *Report and Order* that passive investments should not give rise to affiliation, the Commission's above quoted language "largely render[s] the passive investment exception superfluous."[99] ACA states that investment by an institutional investor provides only a set amount of capital, and that minimal measures taken by otherwise passive investors to protect their investment, such as sitting on a board and reviewing budgets and business plans, do not give rise to operational advantages that make small operator rate exemptions unnecessary.[100] ACA asks that the Commission repeal the limitations imposed upon the passive investor exception, asserting that the limitations "do not reflect marketplace realities" and that "the Commission's decision [is] arbitrary and capricious."[101] According to the ACA, the Commission should instead adopt the Small Business Association's affiliation standards.[102]

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[95] *Report and Order* ¶ 73.

[96] *Id*.

[97] *Id*.

[98] *Id*.

[99] ACA comments at 4.

[100] *Id*. at 5.

[101] *Id.* at 6. ACA also asks for a stay of the passive investment limitations contained in the *Report and Order*. Inasmuch as we deny ACA's petition for reconsideration of the *Report and Order*, the petition for partial stay is denied as moot.

[102] *Id.* at 8. NATOA states, as a general proposition, that the Commission should reconsider its "small cable operator standards," asserting that the standards eliminate the ability of the LFA to assure that rural and small markets have reasonably priced service that is reasonably equivalent to major markets (NATOA comments at 20). NCTA replies that, while it is unclear as to what NATOA refers, to the extent NATOA asks that small operators that qualify for basic tier rate deregulation continue to justify their rates with LFAs, such action is plainly forbidden by the 1996 Act (NCTA opposition at 10). NATOA does not specify as to what it objects, and in the absence of such specification, it is not possible to examine NATOA's assertion in any meaningful way. As Time Warner notes, the statute provides for rate deregulation for qualifying small operators. This *Order on Reconsideration* is not the proper forum for requests for statutory change.

In support of its assertions, ACA cites its own and other comments previously considered in the context of the *Report and Order*.[103]

36. We are presented with no new facts or arguments to support reconsideration of the Commission's interpretation of passive investment contained in the *Report and Order*. Contrary to ACA's assertions, the Commission did not "erroneously presume that access to capital" equates to "access to expertise and personnel needed to comply with rate regulatory burdens." In fact, in the *Report and Order*, the Commission recognizes that the affiliation test in the context of the 250 million dollar threshold focuses on access to financial resources *rather than* access to expertise and efficiencies associated with access to a wider subscriber base.[104] In keeping with this objective, the Commission modified its previous decision to count both active and passive investments when determining small cable operator affiliation, finding in the *Report and Order* that truly passive investments should be excluded.[105] We are not persuaded, however, that an investor that also has its representatives involved with the operation of the business remains a truly passive investor.

V. LEC EFFECTIVE COMPETITION

37. The 1996 Act provided that a cable operator would be subject to effective competition (and, therefore, exempt from rate regulation) if comparable video programming is offered to subscribers within the cable operator's franchise area by, or over the facilities of, a local exchange carrier ("LEC") or its affiliate.[106] NATOA asks that the Commission reconsider its construction of the term "offer," asserting that the *Report and Order* implies that effective competition could be found if a LEC merely has the potential to "offer" service in the near future as opposed to actually offering it.[107] Time Warner answers that NATOA's worries are ill-founded, as the Commission has made it clear that it would make a fact-specific finding in each case, taking the particular circumstances into account, when determining whether LEC effective competition exists.[108] NCTA does not directly address this issue in its opposition, but states in a footnote that NATOA is in error because Congress never required as part of the test that the Commission ignore potential LEC competition.[109] Time Warner adds that Congress' failure to formulate a pass or penetration portion of the test is evidence that the Commission should in fact have no role in determining the sufficiency of competition presented by a LEC.[110]

38. We are presented with no new facts or arguments that warrant reconsideration of our decision in the *Report and Order*. We note Commission decisions that contradict NATOA's characterization of the Commission's understanding of the term "offer" when determining if there is

[103] ACA comments at 8.

[104] *Report and Order* at nt. 211.

[105] *Report and Order* at 73.

[106] 47 U.S.C. § 543 (l)(1)(D).

[107] NATOA comments at 19.

[108] Time Warner opposition at 21-22.

[109] NCTA opposition at note 25.

[110] Time Warner opposition at 21-22.

effective competition by a LEC.[111] In these decisions, we examined several factors when making our determination as to whether a LEC offers service in a franchise area, including (but not solely restricted to) potential LEC service in the area.[112]

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that, pursuant to sections 4(I), 4(j), 303(r), as amended, 47 U.S.C. §§ 154(I), 154(j), 303(r), and the Telecommunications Act of 1996, sections 301 and 302, this *Order on Reconsideration* is ADOPTED.

40. IT IS FURTHER ORDERED that the Petition for Partial Stay filed by the American Cable Association is DENIED.

41. IT IS FURTHER ORDERED that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1995), the petitions for reconsideration or clarification are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[111] *See e.g., In the Matter of Marcus Cable Associates, L.P., Charter Communications Entertainment II, L.P. and Long Beach Acquisition Corp., Petitions for Determination of Effective Competition, Applications for Review*, CSR 5145-E, 5070-E, Memorandum Opinion and Order, FCC 01-235 (rel. August 16, 2001).

[112] *Id*.